

12 March 1982

NOTE FOR: D/OEXA

FROM: C/HL/LLD

SUBJECT: HPSCI Comments on Proposed Changes to E.O. 12065

Attached for your information is a copy of the 9 March HPSCI
Chairman Edward Boland (D., MA) letter to NSC Director Clark re Sub-
ject. Note, in particular, the letter's last paragraph.



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Attachment

cc DD/OEXA w/attach
D/GC w/attach
OGC [redacted] w/attach
C/LED/OGC [redacted] w/attach
C/IMS [redacted] w/attach

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U.S. HOUSE OF REPRESENTATIVES

PERMANENT SELECT COMMITTEE

ON INTELLIGENCE

WASHINGTON, D.C. 20515

*Received 5:30 pm
9 March 82*

March 9, 1982

The Honorable William P. Clark
Assistant to the President for
National Security Affairs
The White House
Washington, DC 20500

Dear Mr. Clark:

I want to begin this letter by thanking you for the opportunity to comment on the provisions of the draft executive order on national security information and also for extending the period for comments. I feel certain you appreciate how important is the process by which the executive order is eventually approved. I believe that many of the goals of the draft can be achieved, although the way in which they are worked out and, most importantly, explained to the public, is worth great attention.

Since receiving the draft, the Committee has sought the viewpoints of the intelligence agencies as to the draft's changes of various provisions in the current Order. The Committee has sought to limit its review to intelligence concerns. You have already received the assessments of four members of the Committee. Other members, myself included, have reservations about certain of these changes.

Interestingly enough, the concerns underlying those reservations appeared not to have been of significant interest to the intelligence agencies from which the Committee heard nor, I gather, were they raised in the comments which these agencies have submitted about the draft. If the draft executive order does not take into consideration such countervailing values, it will lose credibility for lack of balance.

The first consideration to be noted is one of context. Although executive orders are a matter of Presidential discretion, any order dealing with the classification system has a significant and direct effect on legislation within this Committee's purview and on the ability of the Committee and the Congress to effectively perform their oversight functions.

For example, the pending Intelligence Identities Protection Act, some of the existing espionage laws, the Classified Information Procedures Act, the

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oversight provisions of the 1981 Intelligence Authorization Act, and the Freedom of Information and Privacy Acts are all tied in some manner to the classification system. All derive at least part of their continued validity from the presumption that information which is formally classified would in fact impact on the national security if disclosed. Further, the ease with which Congress obtains and disseminates information of public concern is, of course, affected by the classification system.

Clearly, the intelligence agencies are aware of the relation of an executive order on classification and the Freedom of Information Act. They are concerned, it seems, with little else. Equally as clearly, some of the draft order's changes will complicate, if not discourage, Congressional consideration of the Administration's proposed amendments to the Freedom of Information Act. It may call into further doubt the enforcement of other statutes linked to an executive order on classification. Without general acceptance of the basic fairness of such linkage, prosecutors, judges, and juries could all become reluctant to enforce them.

That brings me to another concern, the problem of overclassification. For nearly 30 years, since the Eisenhower Order of 1953, the purpose and effect of each executive order on the classification of information has been to reduce the probability of overclassification and to encourage declassification. The proposed order, whether intended to or not, could well send the opposite message. More information of dubious security relevance will be classified in the first place. Less information crucial to informed public debate will be declassified. Both the interests of open government and the interests of legitimate secrecy will suffer. As Justice Stewart pointed out, "When everything is classified, nothing is classified."

Such an outcome seems likely, and especially troublesome, in view of the fact that most of the significant changes proposed in the draft order stem not from any problems inherent in the classification system itself, but from a desire to alleviate perceived problems in the government's ability to prevail when it raises the "b(1)" exemption in Freedom of Information Act litigation.

In particular the Committee has been informed that the following provisions of the draft order are directly related to litigation "problems":

- ✓ -- the elimination of the existing requirement that information cannot be classified unless it causes at least "identifiable" damage to the national security; and
- ✓ -- the elimination of the "balancing" test as a factor in declassification decisions.

The two provisions of the existing Order at issue here were adopted in 1978 so as to make classifiers' decisions more thoughtful and less automatic. After studying a wide range of judicial decisions, including those suggested by the Information Security Oversight Office, I find it difficult to perceive how the interests of litigation require that these provisions be discarded. The intelligence agencies were unable to cite to the Committee any cases in which a court has assumed the authority to conduct its own balancing test or found that release of information will cause damage to the national security, but not "identifiable" damage. Nor has there appeared any discussion in these cases which would indicate a court ever considered such action. Rather, as the

Department of Justice has conceded, the only justification for the elimination of the balancing test and the "identifiable" concept is the "possibility" that some judge at some time will interpret them incorrectly. Such an argument is too speculative to warrant the elimination of these provisions, which provide salutary policy guidance to all classifiers.

In the case of the first change, if the government must satisfy a court that release of certain information will cause damage to the national security, it cannot do so without identifying that damage with reasonable specificity. Only amending the Freedom of Information Act can affect this burden. Eliminating "identifiable" disposes of no threat to the government's litigative position and sends the wrong message to the public and to classifiers.

With regard to the second change, here also no court has sought to do more than insure that executive branch agencies have -- pursuant to their own regulations -- considered whether balancing was appropriate. It is cautious legal advice to present the strongest possible front to a plaintiff, but bad policy to ignore the public interest that sometimes -- and this should be solely a executive branch decision -- suggests disclosure. Nonetheless, if it is decided that some action must be taken in regard to the balancing test, an appropriate alternative would be to include it in the implementing directive. It then would be crystal clear to any court that the provision is an aid to declassifiers, not a matter for judicial decision.

Many other provisions of the draft propose approaches that give similar signals to declassifiers. To raise them all would make this a very long letter. Therefore I will mention only four additional provisions of the draft which cause major concern:

- ① The addition of "confidential source" as a classification category. The inclusion of "confidential source" in a list that already includes "intelligence sources and methods" is confusing. The confusion is increased by later references (in the presumption section) to "confidential foreign source" and, again, "intelligence sources and methods." Both the State Department and the Information Security Oversight Office have assured the Committee that the new category is included to accommodate certain State Department assets who prefer not to be or cannot be categorized as intelligence sources. If this is true, a more precise means could surely be found to accommodate this preference, a means that is not, like "confidential source," susceptible to a wide-ranging interpretation that could result in the classification of the names of many domestic sources who are U.S. citizens with no connection to the State Department. For example, the term "confidential diplomatic and consular sources" would seem more appropriate.

The overly broad definition of "confidential source" compounds the problem, including, as it does, potential sources. At best, the damage to the national security caused by the unauthorized disclosure of the name of an individual who is not an intelligence source and who is only a potential State Department asset is subject to question. This aspect of the definition ought to be excised.

- ② The addition of the presumption of classification for intelligence sources and methods. In the past the CIA has, in other contexts,

argued to this Committee that there are categories of sources and methods which are not classified or classifiable under executive order standards for classification. It is therefore difficult to accept as the basis for a presumption that all sources and methods would damage the national security if disclosed, especially in light of the government's acknowledgement in the Sims case that Pravda and The New York Times are sources.

It is unclear what such a presumption would add in the litigation arena, since sources and methods are already protected by the "b(3)" exemption, which does not require that harm to the national security be demonstrated.

If the purpose is to enable the government to file less specific "Vaughn" affidavits, as has been suggested, it is questionable whether the perceived gain to be derived in the litigation context outweighs the harm, in terms of potential overclassification, that will be done to the classification system. The presumption device was intended, it should be emphasized, to be an aid to classifiers, not a tool for litigants.

③ The reversal of the existing requirement mandating selection of the least restrictive alternative when a classification decision is in doubt. This change completely alters the tone set by the previous orders and, in any area of doubt, encourages overclassification. I know that it is the considered opinion of some that the tone of the Carter Order goes too far in the opposite direction. While I disagree, if it is felt that some action must be taken, I would suggest retaining the Carter provision but returning it to the status held in the Nixon Administration, an implementing directive.

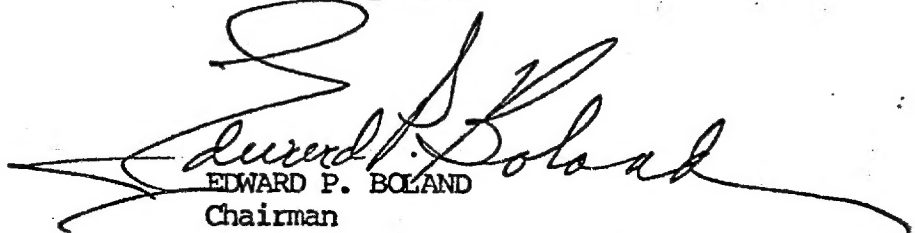
④ The elimination of the requirement that the Archives and each agency systematically review for declassification all classified information over 20 years old. This provision, essentially the same in both the Nixon and Carter Orders, is significant for two reasons. It underscores the need to attach equal weight to both classification and declassification and insures an orderly method for access to publicly relevant historical materials. There seems little doubt that the change in the Carter Order to a 20 year review from the 30 year review of the Nixon Order has caused substantive problems, and that budget and manpower limitations have prevented the review contemplated by the Carter Order. The answer, however, is not to drastically alter the process, but to return to a more realistic time frame, with acknowledgment that all declassification goals might not be met, while retaining the program and the Presidential support for it that is ordered by its inclusion in an executive order. Adequate funding of the program is also essential. Otherwise, this reduction of the declassification effort, by increasing the volume of information needing secure storage, will ultimately cost more money than it saves.

I hope that these comments will aid your deliberations over the draft order. The view of a significant number of members of this Committee is that Executive Order 12065 is a sound document from a classification standpoint and that the major changes thereto contemplated by the draft order are unwise from

a classification standpoint and unsustainable from a litigation standpoint. If implemented, the changes can only encourage overclassification and, ultimately, further lessen the confidence of the Congress and the public in the classification system. I urge you to take into consideration these concerns. They must be balanced against the sincere, but one-dimensional, objectives advanced by the intelligence agencies. Essentially, the balance I believe they argue for is an executive order that gives instructions to classifiers, not to courts. ←

With every good wish, I am

Sincerely yours,


EDWARD P. BOLAND
Chairman

TRANSMITTAL SLIP		DATE 17 MAR 82
TO: C/CRD <i>[Signature]</i>		
ROOM NO.	BUILDING	
REMARKS:		
<p>C/OPS <i>[Signature]</i> C/ADM <i>[Signature]</i> - HAVE MADE COPY <i>[Signature]</i> STUDYING IT.</p> <p>FYI AC/INT <i>[Signature]</i> 17 mar C/S+T <i>[Signature]</i></p> <p>JOAN - FILE! REVISION OF 12065</p> <p>ALSO: D/IS ADVISES THAT DOD IS DROPPING ITS REQUEST FOR A 4TH LEVEL OF CLASSIFICATION (RESTRICTED). THIS FROM <i>[Signature]</i> THERE ARE ALSO INDICATIONS THAT THE EFFORT IS GOING AHEAD, IN SPITE OF THE (ATTACHED) INDICATION OF CONGRESSIONAL FEELINGS, AND THAT THE NEW ORDER MAY BE ON THE PRESIDENT'S DESK FOR SIGNATURE AS EARLY AS NEXT WEEK.</p>		
FROM: Director of Information Services		
ROOM NO.	1200 Ames	2116

FORM NO. 241
1 FEB 55

REPLACES FORM 36-8
WHICH MAY BE USED.

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